



IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-650

HERMINIO CRUZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

REPLY MEMORANDUM FOR PETITIONER

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Herminio Cruz, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 603 F.2d 673 (C.A. 7, 1979).

JURISDICTION

The Opinion of the Court of Appeals for the Seventh Circuit was entered on August 17, 1979. A timely Petition for Rehearing was filed [after an extension allowed by the Court] on September 10, 1979. The Petition for Rehearing was denied on October 2, 1979. The petition was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Fifth Amendment [self-incrimination] and Sixth Amendment [right to counsel] rights were violated where the trial court allowed a post-arrest oral admission into evidence where the evidence revealed that the petitioner was already in custody and had requested counsel . . . prior to the [controverted] oral admission?

1A. Whether a custodial request for counsel precludes the admission of the post-arrest statement in accordance with both *Fare v. Michael*, U.S., 99 S.Ct. 2560 (1979) and *North Carolina v. Butler*, U.S., 99 S.Ct. 1755 (1979)? [In *Butler* the Court noted that at no time did the respondent request counsel . . . 99 S.Ct. at 1756].

1B. Whether the Fifth Circuit *Miranda* interpretation in *U.S. v. Priest*, 409 F.2d 491 (C.A. 5, 1969), is correct [compelling suppression of post-arrest admission after request for counsel] and, if it is, does it so seriously conflict with the decision at bar that certiorari should be

granted to resolve the conflict of opinions within the circuits as to the proper application of *Miranda*?

2. Whether certiorari is appropriate to resolve the question as to whether the trial court must, consistent with 18 U.S.C. § 3501(a), instruct the trial jury on who has the burden of proof and what is the burden of proof where the government offers a controverted oral admission as evidence of guilt?

2A. Whether an instruction to the trial jury regarding a contested oral admission [post-arrest and without counsel] is complete and adequate under federal standards where the trial court declines to charge the proponent of the oral admission with any burden of proof whatsoever?

3. Whether an affidavit for a search warrant which contains serious material factual errors can survive review since *Franks v. Delaware*, 438 U.S., 98 S.Ct. 2674 (1978)?

3A. Whether petitioner was improperly denied "standing" to attack an affidavit for a search warrant where the affidavit contained information from a confidential informer . . . the confidential informer being an alleged court authorized wiretap . . . and where the United States Courts reported that the same wiretap was never installed?

3B. Whether the Court of Appeals committed error in declining to grant petitioner standing to attack an affidavit for a search warrant where the affidavit contained "electronic eavesdropping representations" under the theory that petitioner was not an "aggrieved person" as per 18 U.S.C. § 2510(11) but failed to challenge petitioner's standing to attack the same affidavit as a "person aggrieved" under Rule 41(e), Fed.R.Crim.Proc.?

ARGUMENT

I.

As regarding the confession questions presented in the instant decision (Questions 1-1(b)) the government agrees that "there is a conflict among the courts of appeals as to whether a suspect who has previously invoked his Fifth Amendment right to counsel, but has not yet consulted an attorney, may ever waive his rights in response to custodial questioning" (Gov. Brf., pg. 5). The government thereafter urges that certiorari be denied in that the claim by the government is that this petitioner sought counsel regarding "waiver forms" and not simply on whether or not questions would be answered at all. To this we suggest that the Court of Appeals for the Fifth Circuit squarely answered that the request for counsel regarding the signing of a waiver . . . is a request for counsel and:

"A finding of knowing and intelligent waiver of the right to an attorney is impossible" (*U.S. v. Priest*, 409 F.2d 491 at 493 (C.A. 5, 1969)).¹

The government's facts are less than accurate. For example, at page 3, n.3 the government's brief maintains that the petitioner did not testify at the suppression hearing. The government's brief in the Court of Appeals for the Seventh Circuit states:

"Cruz's testimony on the motion to suppress was that the *Miranda* warnings were not given and that he made no statement whatsoever" (Gov. Brf. in 7th Cir., pg. 18).

¹ Petitioner suggests that *Rhode Island v. Innis*, Cert.Grt'd, 99 S.Ct. 1277 (1979); 26 Cr.L. 4080 (1979) includes questions regarding right to counsel which are similar to those presented within the instant petition.

The government suggests that *in any event* the discovery of the heroin and the sale of heroin "that had previously been observed" renders the petitioner's post arrest statements "probably harmless error if it was error at all" (Gov. Brf. pg. 6, n.7).

The heroin sale of December 16, 1976, was not observed by anyone in that it apparently took place within the private premises that were later searched. In addition, the government offered absolutely no evidence that the petitioner was responsible for that sale. In fact, during the government's closing argument they suggested that it did not matter who was responsible for the heroin sale of December 16 . . . in that the possession of the heroin in the home on the night of December 16 was "constructive possession" and that, coupled with his admissions were the primary evidence of his guilt. It is startling to note that the admissions of the petitioner (controverted and post-arrest and without counsel) . . . INCLUDED NO ADMISSION AS TO A SALE OF HEROIN ON THE AFTERNOON OF DECEMBER 16, 1976.

II.

The government relegates *cert. questions* 2 and 2a to a footnote (Gov. Brf. pg. 4-5, n.5). The government, absent the benefit of authority, suggests that 18 U.S.C. § 3501 does not compel a "confession instruction" and, in any event, the government tells this court that Cruz, expressly "approved" the instruction that was ultimately given by the trial court. Regrettably the government misreads the trial transcripts of December 30, 1977. The petitioner objected to the Court's instruction on how the jury shall consider a confession after the trial court

refused the petitioner's original "confession" instruction.² The "confession" played a major role both in the government's case and at trial. It is not beyond reason to believe that a motion for judgment of acquittal would have been entered at the close of the government's case had there been no admission or confession. A proper instruction was mandated. The jury was not told that they must weigh the out of court statement with "caution" and the court in nowise directed that there was any burden of proof whatsoever regarding the alleged admission or confession. In *Lee v. Mississippi*, 332 U.S. 742 (1947) the Court held that even where the defendant denies the confession constitutional safeguards must apply in order that due process be fulfilled. The *paucity* of authorities in connection with 18 U.S.C. § 3501 strongly suggest that this case is appropriate for certiorari.

III.

The petitioner has pointed out in his opening petition that there is a substantial "standing" question presented in this petition. This Court is aware that petitioner had *standing* to attack the affidavit for the search warrant as a "person aggrieved" under Rule 41(e), Fed.R.Crim. Proc. The most glaring factual allegations in the affidavit for the search warrant (appended to the opening petition) relate to matters which were *apparently*³ part of a court authorized wiretap out of

² Petitioner had offered the trial court two (2) separate instructions, these included Devitt and Blackmar, 2nd Edition, #11.16, and a second instruction is now offered in the Devitt and Blackmar, 3rd Edition, #15.06.

³ Appendix D in the Petition for Certiorari shows that the U.S. Court Commission reported that the particular court

(Footnote continued on following page)

Massachusetts. The government claimed that this Court authorized wiretap was in effect on December 16, 1976. The petitioner was denied the right or opportunity to contest those portions of the affidavit relating to the "court authorized wiretap" because petitioner was not an "aggrieved person" as per 18 U.S.C. § 2510 (11). Petitioner has pointed out that there seems to be no difference as between "a person aggrieved" and an "aggrieved person". Nevertheless, the trial court declined to grant petitioner "standing" and indeed, denied the petitioner access to the eavesdropping materials based upon the fact that the trial court took the view that the petitioner was not an "aggrieved person" under 18 U.S.C. § 2510 (11). However, the trial judge did state:

"I regard this as a substantial question and certainly not one which has been raised frivolously by the defense. It is one that is not without difficulty". (Tr. 77)

* * * * *

"I am the first to say that I could well be wrong, and I know that I will not be the final word on this matter." (Tr. 80)

The opening petition, while suggesting that both the trial court and the appellate court erred in refusing to apply a proper "standing" status . . . urged that *U.S. v. Salvucci*, 599 F.2d 1094 (C.A. 1, 1979), provided abundant authority for petitioner's proposition that he was unreasonably denied "standing" to attack the under-

³ *continued*
authorized wiretap in this case was "never installed". For whatever reason, the government in their brief in opposition make absolutely no reference to this exhibit. The court authorized wiretap was either "operative or never installed". The petitioner has offered evidence that it was "never installed". No hearings have been held to determine the viability of the petitioner's claim.

lying electronic eavesdropping; same being a very material portion of the affidavit for the search warrant which was used to enter the private premises on December 16, 1976, in Chicago, Illinois, and seize the heroin which was the subject of the indictment in this case.⁴ Of course, on the execution of the search warrant the petitioner was arrested. His controverted post-arrest "admissions" flowed from the seizure and arrest. Thus the importance of petitioner's claim is not disputed by the government.⁵

As the government is now aware this Court granted certiorari in *Salvucci v. U.S.*, 100 S. Ct. (1979).⁶ Thus, the standing questions raised in our petition [and in both the district court and the Appellate Court] will undoubtedly be answered by the court's decision in *Salvucci*.

⁴ The affidavit for the search warrant is reproduced in the petition for cert. at Grp. App. "C"; pp. 8a-12a. Paragraphs 2 & 3 of the affidavit reflect information from a reliable informant. The reliable informant is a wire-tap . . . not a person. Whether the wire-tap was court-authorized is a clear subject of dispute.

⁵ If the search warrant falls, so does the balance of the evidence offered against the petitioner.

⁶ *U.S. v. Salvucci*, 79-244; cert. granted December 10, 1979.

CONCLUSION

Petitioner, Herminio Cruz, respectfully urges that his petition for certiorari be granted.

Respectfully submitted,

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